

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 02 July 2007

Case Nos.: 2006LHC01708 & 2007LHC00242

OWCP Nos.: 5-103327 & 5-123825

In the Matter of:

E.B.,

Claimant,

v.

ATLANTICO, INC.,

Employer,

and

W.F. MAGANN CORP.,

Employer,

and

KIMBERLY B. WRENCH,

Party Respondent,

and

DAVID B. O'NEAL,

Party Respondent,

and

PATRICK HARGIS,

Party Respondent,

and

ALLISON FISK,

Party Respondent,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances: Gregory Camden, Esq.
For Claimant

F. Nash Bilisoly, Esq.
For Employer W.F. Magann

Robert A. Rapaport, Esq.
For Patrick Hargis

Matthew Meadows, Esq.
For Allison Fisk

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), as amended, 33 U.S.C. §§ 901, *et seq.*, which establishes a compensation scheme for longshore and harbor workers who suffer work-related injuries. In this case, Claimant E.B. has alleged that he suffered a work-related injury on May 9, 1997 and therefore is entitled to temporary total disability benefits from May 10, 1997 to May 22, 1997 and August 22, 1997 through May 28, 2000 and permanent total disability benefits from May 29, 2000 to the present and continuing. On February 2, 2007, a formal hearing was held in Newport News, Virginia.¹ At that hearing, the parties who were present – Claimant, Employer W.F. Magann ("Magann"), Party Respondent Patrick Hargis, and Party Respondent Allison Fisk – submitted stipulations, which were received into evidence. Also at the hearing, Claimant submitted Exhibits 1, 2, and 4 through 26, which were admitted into the record.² Post-hearing, on May 8, 2007, Claimant and Magann each filed a brief with the court. On May 29, 2007, the Director, Office of Workers' Compensation Programs ("Director") filed a brief. Thereafter, on

¹ The hearing, which was originally scheduled for September 15, 2006, was cancelled and rescheduled for February 2, 2007, upon a showing of good cause by Employer Magann. Order Continuing Hearing, dated September 7, 2006 and Order Continuing Cases and Rescheduling Hearing, dated November 30, 2006.

² The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits and "TR" for the Transcript of the February 2, 2007 hearing. At the hearing, Claimant's counsel withdrew Claimant's Exhibit 3. (TR 27:12-22.) Also at the hearing, Counsel for Respondent Hargis submitted four exhibits into the record, which were later withdrawn. (TR 28:13-29:6, 63:19-25.) Additionally, the Presiding Judge ruled that Employer Magann could not introduce a labor market survey or the testimony of a vocational counselor into the record, because such evidence, under the circumstances, would be prejudicial to Claimant. (TR 9:12-16.) In this case, Claimant's counsel asserted that he had no knowledge of Magann's vocational counselor prior to January 16, 2007 or of the labor market survey prior to January 31, 2007. (TR 7:5-18.) Continuing the hearing in this case was not a viable option.

June 8, 2007 both Claimant and Magann filed their reply briefs with the court. Accordingly, the findings and conclusions that follow are based on a complete review of the entire record in view of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

POST-HEARING PROCEDURAL HISTORY

In this case, post-hearing, the Presiding Judge dismissed Respondents Wrench, O'Neal, Hargis, and Fisk because no evidence was submitted at the hearing, which established that any of these individuals was an officer of Employer Atlantico ("Atlantico"). Post-hearing Order #1, dated February 5, 2007. Pursuant to the Act, if an employer is a corporation, the president, secretary, and treasurer of that corporation "shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said Act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by section 32 of this Act." 33 U.S.C. § 938(a). Accordingly, before Respondents Wrench, O'Neal, Hargis, and Fisk can be held "severally personally liable, jointly" with Atlantico, the evidence must establish that these individuals were officers of the corporation. As previously stated, no such evidence was introduced at the hearing.³

Thereafter, on February 5, 2007, Claimant moved to have the record reopened so that additional documents pertaining to the liability of Respondents Wrench, O'Neal, Hargis, and Fisk could be introduced into evidence. By Order dated February 9, 2007, the Presiding Judge denied Claimant's motion to reopen the record.⁴ Post-hearing Order #2, dated February 9, 2007. In that Order, the Presiding Judge provided the following rationale:

As previously stated, this is a *de novo* proceeding. The documents in question were in the hands of the Director's legal counsel since 2005. All parties had access to them since 2005, yet failed to offer them into evidence at the hearing. These proceedings are adversarial in nature, and the parties prepare their cases as they see fit. Certain readily available documents were not offered. The record was closed. Motions to dismiss were made. Orders to dismiss four individuals

³ Moreover the Presiding Judge also notes that while there is uncontradicted evidence in the record that Atlantico was uninsured at the time of Claimant's injury, *see infra* CX 1 and CX 7, and that Atlantico is now insolvent, *see infra* CX 5, there is no evidence in the record that specifically addresses whether Atlantico had authorization to act as a self-insurer as permitted under Section 32 of the Act. 33 U.S.C. § 32(a)(1). Indeed, all that the evidence of record establishes, with regard to whether Atlantico was authorized to act as a self-insurer (pay compensation directly), is that the Office of Workers' Compensation Programs ("OWCP") had knowledge that Atlantico did not carry longshore liability insurance at the time of Claimant's accident (CX 7) and that Claimant was receiving benefits due pursuant to the Act directly from Atlantico (CX 4 and CX 6).

⁴ While it is true that the Presiding Judge is not "bound by common law or statutory rules of evidence or by technical or formal rules of procedure," 33 U.S.C. § 923(a) and 20 C.F.R. § 702.339, it is also true that the Presiding Judge is not required to accept into the record evidence that was not timely submitted due solely to a parties own lack of due diligence. *Compare Durham v. Embassy Dairy*, 19 BRBS 105, 107-08 (1986) and *Sam v. Loffland Bros. Co.*, 19 BRBS 228, 230 (1987) with *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185, 187-88 (2002); *see also* 20 C.F.R. § 702.338 and 29 C.F.R. § 18.54(c). In this case, the Presiding Judge notes that the liability of the dismissed respondents is not a new issue that was raised for the first time at hearing and that all parties in this case have been provided with a reasonable opportunity for a fair hearing.

were given because no evidence in the record identified any of them as corporate officers of Atlantico, Inc. during the relevant time period.

Following the denial of Claimant's motion, by letter motions dated February 9 and 13, 2007, Claimant again requested that the Presiding Judge either reopen the record or permit Claimant to file an interlocutory appeal. Claimant's motions were denied. Post-hearing Order #3, dated February 26, 2007. In that Order, the Presiding Judge noted that Claimant presented no argument that justified granting either of Claimant's requests.

Accordingly, for the reasons just discussed, Respondents Wrench, O'Neal, Hargis, and Fisk were dismissed as parties in this case.

ISSUES PRESENTED

Therefore, in light of the foregoing, there are three remaining issues to be adjudicated in this case:

1. Is Claimant's current head, neck, and right arm condition causally related to his employment activities of May 9, 1997?
2. What is the extent and nature of Claimant's disability?
3. Is Atlantico or Magann the employer responsible for the payment of Claimant's benefits pursuant to the Act?

STIPULATIONS

At the hearing, Claimant and Employer Magann stipulated to, and the Presiding Judge finds, the following facts:⁵

1. Claimant's employment at the time of his injury satisfies the status and situs requirements of the LHWCA;
2. Claimant sustained an injury to his head, neck, and right arm on May 9, 1997;
3. Claimant's average weekly wage at the time of his injury was \$1,004.70, which results in a compensation rate of 669.80;
4. Claimant was paid benefits pursuant to the Virginia Workers' Compensation Act, from May 10, 1997 through the present, at the state maximum compensation rate with cost of living adjustments;
5. Employer Atlantico, Inc. ("Atlantico"), prior to going bankrupt, supplemented Claimant's state workers' compensation benefits with the excess compensation due under the Act (1)

⁵ Respondents Fisk and Hargis, who have been dismissed as parties to this proceeding, also joined in the stipulations.

from May 10, 1997 to May 22, 1997 and from August 22, 1997 to September 30, 1997 at the rate of \$173.13 and (2) from October 1, 1997 through November 30, 2003 at the rate of \$157.13;

6. Upon determination of the responsible employer under the Act, that party shall be entitled to a credit for all payments made under the Virginia Workers' Compensation Act by Atlantico prior to going bankrupt.

(TR 9:18-13:4.) In this case, the Presiding Judge notes that all named parties were not present at the hearing and therefore did not agree to the stipulated facts. Nevertheless, notwithstanding the foregoing, after reviewing the undisputed relevant evidence in this case, the Presiding Judge finds that the stipulated facts are supported by, and consistent with, the evidence of record.⁶ Accordingly, the Presiding Judge accepts these facts to be true with respect to all parties.

SUMMARY OF THE EVIDENCE

Testimony of E.B.

Claimant, who was fifty-one years old at the time of the hearing, testified that on May 9, 1997, he was employed by Atlantico. (TR 55:3-10.) Claimant stated that he was hired by Atlantico to weld fuel lines for the Navy and that his entire term of employment with Atlantico was spent working on Pier 20 at Norfolk Naval Base. (TR 55:11-17, 56:2-9.) Claimant further testified that he had been working for Atlantico for a couple of months before he was injured and that, prior to working for Atlantico, he had at least thirty years of welding experience. (TR 55:18-56:1.) Claimant stated that his work activities were directed by a Mr. Brickey Hughes. (TR 60:15-18.)

With regard to the events of May 9, 1997, Claimant testified that he recalled that at some time after 3:30 p.m. he had been working on Pier 20 when a storm began to rage. (TR 56:10-17.) Claimant stated that he remembered sheet metal flying around and then being in the hospital. (TR 56:10-17.) He testified that his only memory prior to waking up in the hospital was that he had lost some of his teeth. (TR 56:18-21.)

At the hearing, Claimant testified that as a result of the accident, he suffered an injury to the back of his head on the left side, cut his lip beneath his nose, broke his nose, lost three teeth, and injured his neck. (TR 56:22-57:12.) Claimant testified that, after his accident, he could no longer weld because of his physical problems, and that he attempted to return to work for Atlantico in a supervisory capacity, but was unable to work for more than two or three days. (TR 57:19-58:13.)

With regard to the medical treatment he has received for his injuries, Claimant testified that under the care of a Dr. Partington, he received physical therapy and then surgery for his neck problems. (TR 57:13-18.) At the hearing, Claimant testified that, after two surgeries, he continues to experience pain in his neck and right arm. (TR 58:16-59:1.) Claimant stated that,

⁶ The Presiding Judge notes that the only relevant evidence in the record reflects that Atlantico, who apparently never formally filed for bankruptcy, is no longer solvent or in business. (CX 5.)

for the last five or six years, he has been treated by a Dr. Hansen, who is a pain-management specialist. (TR 59:2-14.) Claimant testified that he sees Dr. Hansen every month and that Dr. Hansen has given him prescriptions for six or seven different medications, including Oxycontin, Vicodin, and Lunesta. (TR 59:10-60:14.)

Testimony of Brickly Hughes, Jr.

At the hearing, Mr. Hughes testified that at the time of Claimant's accident in 1997, he was working as a superintendent for Atlantico on Pier 20 of the Norfolk Naval Base. (TR 30:12-31:2.) He testified that his job was to "make sure all the work got done." (TR 31:12-16.)

With regard to how Atlantico was hired to work on the pier, Mr. Hughes testified that it was his understanding that the Navy had set aside money to renovate multiple piers, but that due to unexpected problems with the first pier, there was not enough money in the budget to complete the renovations on the additional piers. (TR 31:17-21.) As a result, Mr. Hughes testified that he believed the Navy directly awarded a portion of the pier renovation project to Atlantico, which was an 8(a) contractor and, therefore, could be paid with other funds. (TR 31:21-25.) At the hearing, Mr. Hughes testified that this was not the way a job would normally be awarded. (TR 32:8-9.) Mr. Hughes stated that the government "would ordinarily have a prime contractor, and [it] would have the exclusive responsibility to do the entire job." (TR 32:12-14.)

With regard the renovation of Pier 20, Mr. Hughes testified that Atlantico and Magann were the only prime contractors on the pier. (TR 32:15-19.) Mr. Hughes testified that Atlantico was initially hired to renovate sanitation and oily-waste piping and to perform electrical upgrades to the pier. (TR 31:3-6.) He testified that "halfway through the job, [the Navy] gave [Atlantico] a change order to replace fuel piping" as well and that Atlantico had subcontractors working for it on the pier. (TR 31:6-7, 32:25-33:6.) With regard to Magann, Mr. Hughes testified that Magann was hired to do "the structural renovation of the concrete work" and that it also had its own subcontractors who installed the new electrical piping and replaced the steam piping on the pier." (TR 32:20-24.)

With regard to whether there was any type of hierarchy on the pier, Mr. Hughes testified that, while Atlantico had its own contract with the Navy, Magann dictated the pace of the job and ultimately had control of the job. (TR 33:9-12.) Overall, Mr. Hughes testified that he would receive direction from a Magann employee named Ray Via regarding scheduling, housekeeping concerns, and moving equipment. (TR 33:14-34:2.) He testified that Atlantico "had coordination and scheduling meetings with the Navy, and if Magann didn't feel like Atlantico was keeping up with their pace – and they're renovating the surface of the pier so we have to go with them, then it became an issue." (TR 34:2-6.)

On the other hand, Mr. Hughes further testified at the hearing that, with regard to the relationship between Magann and Atlantico while working on Pier 20, Atlantico (1) was not a subcontractor of Magann, (2) did not submit its bills for work performed on the pier through Magann, (3) did not clear the hiring of its employees or subcontractors with Magann, and (4) had a work compound where its employees reported that was separate from Magann's compound. (TR 39:11-41:24, 48:21-24.) At the hearing, Mr. Hughes also acknowledged that it made sense

that Atlantico had to pace its work with Magann's work, because Magann was renovating the surface of the pier, which directly impacted Atlantico's ability to reach the portions of the pier where it was working. (TR 41:25-43:13.) Mr. Hughes also testified that on at least two occasions, Atlantico had subcontracted out portions of its contract with the Navy to Magann, i.e. Magann was Atlantico's subcontractor during part of the project. (TR 43:13-48:20.) At the hearing, Mr. Hughes testified that Atlantico contracted with Magann to have Magann (1) fill in holes that Atlantico had drilled into the pier while repairing the fuel lines that Claimant was hired to weld and (2) build the concrete bases for light posts that Atlantico was under contract with the Navy to construct. (TR 43:13-48:20.)

At the hearing, Mr. Hughes also provided testimony regarding Claimant's work on the pier. Mr. Hughes testified that Claimant was specifically hired by Atlantico to weld fuel pipes pursuant to a change order issued on Atlantico's contract with the Navy, and that Claimant had been working on the fuel piping job for a couple of months prior to being injured. (TR 49:9-50:21, 53:1-19.) With regard to Claimant's accident on May 9, 1997, Mr. Hughes testified that on that day, there were no Magann employees on the pier. (TR 45:17-46:1.) He stated that, on that day, while Atlantico was working on the fuel piping, it began to storm. (TR 34:12-23.) Mr. Hughes testified that everyone began running off the pier and that, during that time, he saw Claimant get struck in the back of his head by a four by four foot sheet of metal that had been blown off of the pier by the wind. (TR 34:12-23.) Mr. Hughes testified that the sheet of metal belonged to Magann. (TR 5-8.) He testified that after Claimant had been struck by the sheet metal, "[h]e went down face first with his arms out by his side" and was unconscious for approximately thirty seconds. (TR 34:22-23, 35:17-21.) Mr. Hughes stated that, thereafter, Claimant was very dazed and that he noticed a "big hole through [Claimant's] chin, and [that] [Claimant] was bleeding profusely from the back of his head." (TR 36:1-4.) He stated that he took Claimant to the hospital and thereafter only saw Claimant for two or three months while Claimant attempted to return to work on a light-duty basis. (TR 9-23.)

Testimony of Patrick Hargis

At the hearing, Mr. Hargis testified that he has been employed by the United States Marine Corps since 2004 (TR 62:22-25.) He testified that, prior to 2004, he was a full-time student. (TR 63:1-2.) Mr. Hargis further testified that, in 1996, his only relationship with Atlantico was that it was owned by his wife. (TR 63:6-10.)

Deposition Transcript of Brickey Hughes, Jr., dated October 13, 2006 (CX 1)

In this case, in addition to testifying at the hearing, Mr. Hughes also provided testimony by deposition on October 13, 2006. (CX 1.) At his deposition, in addition to discussing what has already been summarized above, Mr. Hughes testified regarding several other topics. Specifically, Mr. Hughes stated that, with regard to whether Magann had knowledge of Claimant's accident, Magann's superintendent and project manager knew about the accident. (CX 1-13.) Mr. Hughes explained that, after the accident occurred, the Navy conducted a "fair sized investigation," which involved discussing the incident with both Atlantico and Magann. (CX 1-13.) Mr. Hughes also testified that, with regard to Patrick Hargis, Mr. Hargis did not work for Atlantico in May of 1997 and that he did not know if Mr. Hargis was an officer of the corporation at that time or whether Mr. Hargis knew of Claimant's accident. (CX 1-22 to 1-23.)

Mr. Hughes further testified that he did not know for sure what type of workers' compensation insurance Atlantico carried prior to Claimant's accident, but that he had been told that Atlantico only had state workers' compensation insurance. (CX 1-23 to CX 1-24.) Also at his deposition, with regard to Allison Fisk, Mr. Hughes testified that his only knowledge of Ms. Fisk was that she performed bookkeeping duties for Atlantico and was working for the company in 1997. (CX 1-25 to 1-26.)

Also at his deposition, Mr. Hughes provided additional testimony regarding the relationship between Atlantico and Magann while working on Pier 20. Mr. Hughes testified that Magann "had a say-so" regarding where on the pier Atlantico stored its materials. (CX 1-15.) He testified that, while Magann did not have to comply with Atlantico's wishes regarding where materials were stored, Atlantico had to comply with Magann's instructions. (CX 1-42 to CX 1-43.) Mr. Hughes explained that if Magann wanted Atlantico to move its materials, Magann would contact the contracting officer, who would force Atlantico to comply with Magann's request. (CX 1-42 to CX 1-43.)

Mr. Hughes also testified that, even though Atlantico had its own contract with the Navy, essentially, Magann was in charge of the project "as a whole." (CX 1-15 to CX 1-16.) Specifically, Mr. Hughes stated that he "remembered [Magann] being who [he] had to answer to if [he] wanted to arrange something or coordinate something that had to be done." (CX 1-16.) He testified that to the extent Atlantico's work impacted the structural integrity of the pier, Magann "had a say-so" in how the work was completed and the overall quality of the work. (CX 1-30 to CX 1-31.) Mr. Hughes explained that, while it was Atlantico's responsibility to make sure that its work complied with the government's specifications, "it was [Magann's] responsibility to police kind of [Atlantico's] work and installation and make sure that it was compliant." (CX 1-30 to CX 1-31.) Mr. Hughes explained that this was "in everybody's best interest[.]" (CX 1-31.)

At his deposition, Mr. Hughes also testified that the Navy held weekly meetings with the supervisors of Magann and Atlantico and that at these meetings Magann was treated as the general contractor. (CX 1-19 to CX 1-21.) Mr. Hughes stated that the Navy directed and expected Atlantico to "coordinate all of [their] efforts and everything [they] got done with [Magann's] schedule and keep up with the pier pace," which Mr. Hughes stated, for all practical purposes, made Atlantico a subcontractor to Magann. (CX 1-21.) On the other hand, when further questioned, Mr. Hughes acknowledged that Atlantico had to coordinate its work with Magann so that Atlantico's work would not interfere with Magann's work, which was a major part of the pier renovation. (CX 1-29.)

**Correspondence to Associated Regional Solicitor's office from Claimant's counsel,
dated September 8, 2006, with attachments (CX 2)**

Attached to a letter sent by Claimant's counsel to the Associated Regional Solicitor are two Investigation Incident Witness Interview Summary Forms. The first form was written by David Scott on May 11, 1997 and second form was written by Claimant on May 13, 1997.

Mr. Scott wrote:

I was not a witness to the accident but I saw the Magann employee take the bands off the decking material. This happened about 2:00 PM 5/8/97. At the time there was nothing put on top of the metal to prevent it from blowing away. (CX 2-3.)

Claimant wrote:

On Friday May 9, 1997 at approximately 5:30 PM I was working on Pier 20 and had just finished installing some pipe to be welded. I was walking on the pier towards the trailer when the wind suddenly started blowing extremely strong. The next think I remember was feeling a lot of pain and seeing blood. The paramedics came, put me in an ambulance and took me to the hospital. (CX 2-4.)

Also attached to the letter is a printout of a webpage from Magann's website, printed on September 7, 2006, which states:

Structural Repairs/Upgrade to Piers 20-24

Location:

U.S. Naval Station
Norfolk, Virginia

Start Date:

October 1992

Completion Date:

November 1997

Project Description:

Our contract to perform extensive repairs to four (4) of the most actively used submarine piers included structural repairs to piles, pilecaps, beams, slabs, curbing, fender system, and replacement of center portions of the pier deck and supporting structures. Broken concrete was loaded on barges and towed to the Chesapeake Bay where it was unloaded on an artificial reef owned by the state. In addition , mechanical work included the demolition and disposal of steam pipe insulation containing asbestos fibers, replacement of existing steam pipe demolition, disposal and installation of new potable water lines with associated backflow preventers, demolition of fuel lines and the replacement of the vault ventilation systems. After completion of the structural repairs on Pier 23, the Navy determined the existing electrical distribution was unsafe and the electrical system was red-tagged and condemned. In order to expedite this major renovation, W.F. Magann Corporation entered into a partnering agreement to select a design team, work in coordination with Public Works, select subcontractors, and fast track the project from start to finish. This project would

have taken two years to implement and complete; however, all work was designed and completed and the pier released for occupancy in ten months.

W.F. Magann Corporation performed the structural repairs, concrete demolition, pile driving, fender repairs, hauling concrete work, miscellaneous metal installation, epoxy repairs, pneumatic concrete repairs (gunite), excavation, cast-in-place ductbanks, backfill and placement of broken concrete on the reef using our own manpower and company owned equipment including cranes, barges, floating rigs, and required tug boats.

We placed over 7,000 cubic yards of concrete, repaired over 40,000 square feet of caps and beams, installed over 350 fender piles with related wale structures, and installed over 150,000 linear feet of various pipe.

Copyright 2005 ~ W.F. Magann Corporation

(CX 2-5.)

Correspondence from Claimant's prior counsel to Office of Workers' Compensation Programs, dated April 30, 2004, with attachments(CX 4)

Claimant's Exhibit 4 includes a letter sent by Claimant's prior counsel to the OWCP claims examiner, in which Claimant's counsel notes that it appeared that Atlantico paid Claimant benefits "up to the end of November" 2003. Attached to the letter are Claimant's pay stubs from Atlantico, dated December 2002 through November 2003, which show that Claimant was receiving \$157.13 per week in compensation. (CX 4-2 through CX 4-12.)

Summary of Informal Conference and Recommendation, dated November 28, 2005 (CX 5)

Claimant's Exhibit 5 is a LS-280 dated November 28, 2005, in which the OWCP claims examiner noted, in relevant part, that: (1) Claimant sustained an open skull injury while in the employ of Atlantico at the Norfolk Naval Station Pier 20; (2) Claimant had been receiving temporary total disability benefits from May 10, 1997 to the present; (3) Atlantico had been forced to go out of business and to sell its assets, although no formal bankruptcy was filed (there was only an agreement between Atlantico and its bank); and (4) while Atlantico obtained performance and payment bonds for "various projects continuing with Atlantico" from Liberty Mutual, Liberty Mutual had informed OWCP that it at no time carried Atlantico's workers' compensation Longshore coverage. The claims examiner noted that the purpose of the Informal Conference was to determine "who would continue the Longshore benefits to the Claimant." After finding that there appeared to be no viable employer and/or carrier in the matter, the claims examiner forwarded the case to OWCP's National Office for formal review.

Attached to the LS-280 is a letter from Liberty Mutual, dated November 19, 2003, in which the insurance company notified OWCP that Claimant's case did not involve the company, who at no time was "the carrier for workers' compensation for any of Atlantico's projects." (CX 5-3 to CX 5-4.)

Also included in Claimant's Exhibit 5 is the first page of a subcontract between Atlantico and Magann. (CX 5-5.) The contract states that the contract is between Atlantico, the contractor, and Magann, the subcontractor. The contract identifies the project as involving repairs to Pier 20 (oily waste and electrical systems repairs), and that the owner is the Department of the Navy. The contract states that the amount to be paid is \$3,850.00. The remainder of the contract was not introduced into evidence.

Claimant's Exhibit 5 also includes a copy of Sections 4 and 5(a) of the Act. (CX 5-6.)

Payment of Compensation Without Award Form, dated August 10, 1998 (CX 6)

The LS-206 form shows (1) the date of accident as May 9, 1997; (2) the date disability began as May 10, 1997; (3) Claimant's average weekly wage as \$1,004.71; (4) the compensation rate as \$669.13; (5) that from May 10, 1997 to September 30, 1997 Claimant was paid \$496 under the Virginia workers' compensation act and \$173.13 under the LHWCA; (6) that beginning October 1, 1997 Claimant was being paid \$512 under the Virginia workers' compensation act and \$157.13 under the LHWCA; (7) compensation was first paid on May 10, 1997; (8) medical care and treatment was being provided to Claimant; (9) the Employer was Atlantico; (10) and that the form was signed by Mr. C. Fisk, Vice President of Human Resources.⁷

OWCP Report of Telephone Call, dated June 25, 1998, of conversation with Atlantico's attorney Dan Lynch (CX 7)

The report states, in relevant part, that the employer/carrier was conceding jurisdiction, but that Atlantico, at the time of injury, did not have longshore coverage.

Claimant's Virginia Workers' Compensation Wage Chart, dated May 19, 1997 (CX 8)

The chart lists the employer as Atlantico, the date of accident as May 9, 1997, Claimant's total gross monthly earnings and perquisites as \$4,621.79, and that Claimant worked a total of 23 days.

Virginia Workers' Compensation Commission Order, dated January 20, 1998 (CX 9)

The Order notes that Claimant, who was seeking temporary total disability from August 19, 1997 and continuing, and Employer Atlantico had agreed that Claimant "had suffered a compensable change in condition for his May 9, 1997 industrial accident and that he again became disabled as of August 22, 1997." The Commissioner therefore entered an award against Atlantico and its carrier, Great American Insurance Company, "for the payment of compensation as follows: \$496.00 per week during temporary total disability from August 22, 1997, based on a pre-injury average weekly wage of \$1004.70, and continuing until conditions justify a

⁷ The Presiding Judge notes that the OWCP time stamp is dated August 12, 1998. Accordingly, while the Presiding Judge notes that Mr. Fisk wrote 10/8/98 on the form, he interprets the date as August 10, 1998 rather than October 8, 1998.

modification thereof.” The Commissioner also awarded medical benefits for as long as necessary and a fee of \$1,450.00 to Claimant’s attorney at the time, Stephen A. Strickler.

Virginia Workers’ Compensation Commission Award Order, dated June 23, 1997 (CX 10)

This Order approved the parties’ Memorandum of Agreement for the payment of compensation under the Virginia Workers’ Compensation Act. The Order is for an award of compensation of \$496.00 weekly, during incapacity, from May 17, 1997 to May 22, 1997 and medical benefits for as long as necessary. The Order notes that the benefits had already been paid and the award was for record purposes only.

**Investigation Incident Witness Interview Summary by William Joseph Fry,
dated May 13, 1997 (CX 11)**

In the summary, Mr. Fry wrote:

A squall developed while placing a 10’ length of 8” steel ... [illegible] line in the ... [illegible]. The foreman, Bill Ives, told us to head for the trailer after we unhooked the choker from pipe. [Claimant] was jogging about 5 feet ahead of me when the wind picked unsecured metal decking sheets from pallets on the edge of the pier. A piece of this decking struck [Claimant] on the left side of his head. This knocked [Claimant] unconscious immediately. His arms when limp and he went face first to the concrete pier. I went to him to help him but he was unconscious and more sheets were blowing in our direction so I left him and laid across the three pallets of decking until they could get some iron elbows to weigh the decking down. I began first aid on [Claimant] when I arrived at the trailer.

In response to the question of, “why was injured worker moved to the job site trailer?” Mr. Fry stated:

[Claimant] was moved from the pier to prevent further injury. When I first got to [Claimant] he was unconscious and bleeding profusely from the left side of his head and face. I was unable to bring him around by calling his name or rolling him over. When I arrived back at the trailer I applied a cloth, soaked with cold water from the cooler, to the back of his head. [Claimant] was disoriented but understood when I told him to hold the cloth to the area and apply pressure. I got another cloth, soaked it with cold water, and began cleaning the blood from his face so I could assess his facial injuries. I continued until I was relieved by the paramedic crew.

**Investigation Incident Witness Interview Summary by Claimant, dated May 13, 1997
(CX 12)**

The Investigation Incident Witness Interview Summary by Claimant is discussed, supra, under Claimant’s Exhibit 2.

Investigation Incident Witness Interview Summary by William Ives, dated May 12, 1997
(CX 13)

In his summary, Mr. Ives wrote:

After putting pipe in [the] pipe trench we were coming down [the] [pier] with [a] fork lift when a bad wind storm came up fast with trash and dust blowing so bad we could not see anything. It started raining so the men in front of us started running. We stopped and after the dust cleared we saw that the welder was down and the fitter was laying across both piles of sheet metal holding it down. We ran over and put some heavy fittings on the metal to hold it down.

Investigation Incident Witness Interview Summary by Brickey Hughes, Jr.,
dated May 12, 1997 (CX 14)

Mr. Hughes, in his summary, wrote:

Men finished installing pipe, they were coming off the pier when a very high gusty wind came off the water. [Claimant] was struck in the back of the head by a piece of flying sheet metal deck pan and knocked unconscious. His co-worker Bill Fry following directly behind, ran to secure the remaining loose flying pieces. I ran over to [Claimant] and helped him to his feet. He was in danger of being struck again so I made the decision to move him off of the pier. He was bleeding profusely in the facial area and on the side of his head. We tried to stop the bleeding while we waited for Naval paramedics. They arrived [and] quickly began treating his wounds. Once he was stable they put him on a backboard and loaded him in an ambulance to transport to Norfolk general. I contacted his fiancée, stayed long enough to secure our work area, and went to the hospital. Note. I personally witnessed sheet metal pieces fly clear of the pier into the water.

Investigation Incident Witness Interview Summary by David Scott, dated May 11, 1997
(CX 15)

The Investigation Incident Witness Interview Summary by David Scott is discussed, *supra*, under Claimant's Exhibit 2.

Medical Report by Scott W. Sautter, Ph.D., A.B.P.N. (CX 16)

In an undated medical report, Dr. Sautter summarized his findings and opinion regarding Claimant's neurocognitive status. The date of this evaluation was December 21, 2006. In his report, Dr. Sautter stated that the purpose of the examination was to evaluate whether the cognitive difficulties, personality changes, and posttraumatic disorder diagnosed by a Dr. Donald Holzer were related to Claimant's May 1997 injury. As part of this examination, Dr. Sautter

reviewed several of Claimant's medical records and correspondence among Claimant's counsel, a claims representative from the Ohio Casualty Group, himself, and Claimant's various healthcare providers. Also as part of his examination, Dr. Sautter performed a mental status examination, tested Claimant's orientation, awareness, sensory-perception, and motor function. Based on all the foregoing, Dr. Sautter wrote that his "[o]verall impressions of neurocognitive and emotional functioning are consistent with a mild cognitive impairment manifested as reduced information processing speed, sustained and divided attention, as well as immediate and delayed memory." Dr. Sautter further stated that it "would be expected that he would have additional difficulties in executive function skills of instrumental decision making in daily living[.]" and that Claimant "report[ed] a markedly severe level of depression, as well as pain complaints. Dr. Sautter opined that Claimant's "appearance, complaints, and performance on this neurocognitive examination may be the result of over medication, severe pain, severe depression or a combination of these concerns." With regard to whether the foregoing problems are related to Claimant's May 1997 injury, Dr. Sautter stated, that in order to make that assessment, he needed information regarding Claimant's pre-injury capacity.

Report of MRI Study from MRI & CT Diagnostics (CX 17)

This report, dated July 24, 1998, notes a history of a "43 year old man with work related injury May 9, 1997 and status post subsequent anterior C4-5 and C5-6 discectomy with interbody fusion November 18, 1997, now with neck and right upper extremity symptoms for evaluation of possible disc herniation." Thereafter, the report states:

Impression: C4-5 post-operative changes. Reversal of lordotic curvature results in relative narrowing of the central neural canal. Bilateral uncovertebral hypertrophy causes some foraminal narrowing. Clinical correlation is required. C5-6 mild-moderate disc bulging with spur and bilateral uncovertebral hypertrophy. C6-7 mild central disc bulging.

Radiology Results from Sentara Norfolk General Hospital (CX 18)

Claimant's Exhibit 18 is comprised of the radiology results for Claimant's spine, dated May 9, 1997. These records note the following findings:

Prevertebral soft tissues are within normal limits. There is cervical spine straightening, but vertebral bodies, facet joints and posterior elements are well aligned. The posterior spinous process of C4 is slightly deformed. This might account for apparent splaying of the C4-5 posterior interspace. Degenerative changes are seen, particularly at the C5-6 disc space level. The cervical spine is visualized to the C7-T1 level. The atlantodental interval is within normal limits. The oblique projection demonstrates facet joint hypertrophy. Narrowing at the right C5-6 neural foramen. There is also minimal uncovertebral joint hypertrophy. Minimal neural foraminal narrowing at the C4-5 level on the right.

Based on the foregoing, the following impression was given:

Impression:

1. Cervical spine straightening.
2. Question splaying of the posterior elements at C4-5. Unusual alignment of the right-sided facet joints on the oblique projections only, likely related to degenerative changes at this level.
3. Given these findings and the patient paraspinal tenderness, flexation and extension views are recommended.

Flexation and extension views revealed no abnormalities.

Medical Records from Dr. F. Noel Parent III of Norfolk Surgical Group (CX 19)

In a medical report dated September 20, 2002, Dr. Parent summarized his findings and opinion regarding whether Claimant has thoracic outlet syndrome. Based on his review of how Claimant was injured; Claimant's symptoms, physical abilities, medications, and medical, family, and social histories; physical examination of Claimant; and review of Claimant's medical tests, Dr. Parent opined that Claimant "does not have thoracic outlet syndrome, neurogenic type, nor does he appear to have arterial or venous thoracic outlet syndrome."

Medical Records from Dr. Gershon of Rehabilitation Medicine Consultants (CX 20)

In a medical report dated June 10, 1999, Dr. Gershon, after summarizing how Claimant was injured, Claimant's medical, family, and social histories, symptoms, and medications, and the results of Claimant's physical examination, opined that Claimant suffered from chronic myofascial pain and persistent radiculitis. (CX 20-1 to CX 20-3.) Dr. Gershon noted that once Claimant's treatment options were completed, he would need to discuss with him return-to-work issues. Dr. Gershon stated that at that time it would be premature for Claimant to return to work and that "[i]n all likelihood, [Claimant] [was] not going to be able to return to work as a welder."

In a letter, dated August 26, 1999, addressed to Dr. Jonathan P. Partington, Dr. Gershon agreed to turn over the care of Claimant to a Dr. Robert B. Hansen, who had provided Claimant with an independent opinion. Dr. Gershon noted that Dr. Hansen assessed Claimant as suffering from a residual C6 radiculopathy, occipital neuralgia with cervicogenic headaches, a disordered sleep pattern with myofascial pain and essential tremor, fasciculation secondary to root injury and partial RSD with involuntary movements. (CX 20-4.)

Medical Records from The Center of Pain Management (CX 21)

Claimant's medical records from The Center of Pain Management document Claimant's treatment at the center from August 4, 1999 through August 16, 2006. (CX 21-1 to CX 21-137.) The records document that throughout this period, Claimant has suffered from neck and arm pain and been prescribed pain medications such as oxycodone CR and hydrocodn/APAP. These records also document Claimant's physical limitations.

In a Neurological Consultation Report, dated August 4, 1999, Dr. Robert Hansen summarized how Claimant was injured, Claimant's symptoms, medications, and past medical,

social, and family histories. (CX 21-135 to CX 21-137.) Dr. Hansen, as part of his evaluation, also physically examined Claimant. Based on the foregoing, Dr. Hansen opined that Claimant appeared to have suffered a neck injury, which produced a herniated nucleus pulposus, for which Claimant had surgery on two occasions. Dr. Hansen stated that these surgeries had “altered [Claimant’s] neck mechanics” and that Claimant appeared to have “a residual C6 radiculopathy.” Dr. Hansen further opined that Claimant had occipital neuralgia, which was responsible for Claimant’s cervicogenic headaches. He noted that all of “this is compounded by disordered sleep[,]” which “would tend to increase myofascial pain.” Dr. Hansen also stated that Claimant’s tremor appeared to be essential and that other considerations “are a forme fruste of a complex regional pain syndrome with involuntary movements[,]” although Dr. Hansen further stated that “I would tend to think it is more likely myofascial pain with superimposed tremor.”

In a letter, dated April 5, 2000, Dr. Robert Mendez indicated that Claimant had not yet reached maximum medical improvement and that he did not believe that Claimant was able to return to any type of work at that time. (CX 21-129 to CX 21-130.)

On April 24, 2000, Claimant underwent fluoroscopy and received an intralaminar cervical epidural steroid injection from Dr. Mendez. (CX 21-118 to CX 21-120.)

In an office note, dated April 24, 2000, Dr. Hansen noted that in addition to complaining of chronic neck and arm pain, Claimant was also complaining of sleep problems and tinnitus. (CX 21-121.) Dr. Hansen further noted that Claimant had an essential tremor. He opined that while Claimant’s neck pain and posterior headaches were work related, none of his other conditions (essential tremor, sleep problems or tinnitus) were work-related.

On May 17, 2000, Claimant underwent fluoroscopy and received right-sided foraminal cervical epidural steroid injections at C5 and C6. (CX 21-115 to CX 21-117.)

In an office note, dated May 26, 2000, Dr. Hansen opined that Claimant “has chronic and persistent problems” and that Claimant had reached maximum medical improvement. (CX 21-111 to CX 21-114.) Dr. Hansen further stated that it “appear[ed] to be clear that [Claimant] would not be able to return to work in a heavy-duty capacity and that it would be appropriate to obtain a FCE at this point to “help with a return to work recommendation.”

On June 14, 2000, Claimant received two bilateral greater occipital nerve blocks and trigger point injections. (CX 21-108 to CX 21-110.) In the Pain Management Operative Report, Dr. Mendez noted that “[b]y discharge, the patient was feeling significantly improved” and that if Claimant showed improvement, he would consider repeating the injections.

In an EMG Report, dated June 16, 2000, Dr. Hansen stated that Claimant’s nerve conduction studies demonstrated that Claimant suffered from “very mild bilateral median neuropathies at the wrist.” (CX 21-107.) He further noted that “there is evidence for an old C6 radiculopathy on the right.”

A final report of an MRI study of Claimant’s cervical spine, which was performed on June 24, 2000, notes that there are post-operative changes at C4-5 and C5-6 and a small central disc protrusion at C6-7. (CX 21-105.)

On September 16, 2000 Claimant underwent facet joint injections at C3-4 and C2-3 and fluoroscopy, which were performed by Dr. Mendez. (CX 21-98 to CX 21-100.) In the Pain Management Operative Report, Dr. Mendez noted that, if Claimant achieved a “good sustained amount of pain relief,” he would consider a repeat facet joint injection, otherwise he would consider performing a diagnostic medial branch facet nerve block in the same area.

In an office note, dated November 21, 2000, Dr. Hansen noted that Claimant had been very distraught during his last appointment and that Claimant was “desperately in need of psychological assistance as he [came] to terms with [the permanent change in his health].” (CX 21-96 to 21-97.) Dr. Hansen further opined that Claimant had reached maximum medical improvement and that it would now be appropriate to perform a FCE.

On May 2, 2001, Claimant received medial branch facet nerve blocks, right side at C4, C5, C6, and C7; fluoroscopic guidance for spinal injection; and conscious sedation. (CX 21-84 to 21-86.) In the Pain Management Operative Report, Dr. Mendez noted that at the time of discharge, Claimant “was feeling at least 40% pain relief.”

On January 14, 2002, Dr. Hansen opined that Claimant was at “maximal medical improvement, although [he] [would] always attempt to relieve [Claimant’s] pain further.” (CX 21-68 to 21-69.) Dr. Hansen therefore recommended that it was an appropriate time to perform a FCE and further recommended that a vocational assessment be performed after the FCE was completed.

On March 21, 2002, Diane Medley, NP prescribed that Claimant do no heavy lifting, do light medium activities, and avoid prolonged flexion and extension of his neck. (CX 21-65.)

In a letter dated June 12, 2002, Dr. Hansen stated that he believed Claimant at that time was at maximum medical improvement, unless Dr. Parent, who was evaluating Claimant to determine whether there was a vascular contribution to Claimant’s pain, reported a significant problem. (CX 21-60.) In the letter, Dr. Hansen noted that Claimant had had a FCE that suggested work restrictions. Dr. Hansen concluded by stating that he believed “it would be appropriate to proceed with vocational evaluation with an intent toward locating a suitable job” for Claimant and that if such an evaluation was obtained, it would be reviewed by himself, a Dr. Partington, and the “therapy network who performed the FCE.”

In a Medical Evaluation Report, dated August 2, 2004, Dr. Hansen noted that he has treated Claimant since August 4, 1999 and that Claimant suffers from a medical condition that causes pain. (CX 21-52 to CX 21-54.) Dr. Hansen further noted that Claimant’s pain frequently reached a level of severity that would likely affect Claimant’s concentration/memory and distractibility and that Claimant’s pain and/or fatigue results in periods of incapacity (i.e., inability to perform in a work setting). Dr. Hansen also stated that Claimant would not be able to work full-time at any level of exertion due to his disabling pain that increases with activity and his pain related concentration, memory, and mental efficiency problems. With regard to Claimant’s functional capacity, Dr. Hansen noted that this type of assessment is performed by a physical therapist rather than by his office. (*See also* CX 21-56 to 21-57 (letter dated August 2, 2004).)

In a letter to Claimant's counsel, dated October 18, 2005, Dr. Hansen reported his findings from his examination performed that same day. (CX 21-24 to CX 21-25.) In his letter, Dr. Hansen noted Claimant's medical history and history of treatment with the Center. He noted that Claimant's treatment included use of long acting opioids. In his letter, Dr. Hansen expressed the following opinions:

In sum, [Claimant] continues to suffer from neck pain that historically resulted from his injury in 1997. There is no "cure" for this. We are in a situation of ongoing chronic pain management. He has had response to treatment in that there is a reduction in his pain when he takes medication as scheduled. Presently, he reports that there is a 40 to 50% drop in his pain.

I am still of the opinion that [Claimant] requires Botulinum injection. The spasm and restricted motion in his neck is not going to respond to medication treatment. His restricted motion is, in fact, quite striking.

Another issue is of his ability to return to work. He has a surgically fused neck. I do not believe that it is possible for him to return to work at his previous job, which was performing construction work. As stated in my 8/2/04 letter, this limitation would be permanent. A formal assessment of functional capacities was not done, as this is beyond the capabilities of this office. As mentioned also in my 8/2/04 letter, this could be done by means of a physical therapy referral for an FCE.

Medical Records from Thomas Moran (CX 22)

Claimant's Exhibit 22 is an Operative Report, dated June 25, 1999, written by Dr. Thomas Moran, which documents that Claimant received a cervical epidural steroid injection.

Medical Records from C. Greene, Clinical Psychologist (CX 23)

Claimant's Exhibit 23 is the last page of a medical report by a C. Greene, Ph.D. In his report, dated November 27, 2000, Dr. Greene made the following diagnosis:

Diagnosis (Per DSM-IV):

- I: 296.22 Major Depressive Disorder-Single-Moderate
- II: Deferred
- III: Headaches, neck pain, degenerative disc disease, tingling and numbness in his arms.
- IV: Occupational Problems, Economic Problems
- V: GAF=50 (current)

Based on the foregoing, Dr. Greene recommended "individual therapy to assist [Claimant] with his depression and adjustment issues."

**Functional Capacity Evaluation (“FCE”) Summary Report performed by the Sports
Therapy and Industrial Medicine Center (CX 24)**

Claimant’s Exhibit 24 is a Functional Capacity Evaluation (“FCE”) Summary Report produced by Sports Therapy and Industrial Medicine Center. Based on the FCE, which was performed over a two day period (January 30 and 31, 2002), it was recommended that Claimant could function at “a LIGHT MEDIUM physical demand level safely and productively with pacing and guarding of extreme deviated postures and positions.” The report further noted that Claimant “does not demonstrate the ability to effectively meet the critical demands of his customary employment in reference to the Dictionary of Occupational Titles for Welder.”

Medical Records from Dr. Jonathan Partington of Neurosurgical Specialists, Inc. (CX 25)

Claimant’s Exhibit 25 is comprised of medical records dated June 16, 1997 through October 11, 2002. The records document that Claimant was being treated for a chronic intermittent right C6 radiculopathy secondary to his herniated disc. Claimant’s medical records also contain several radiology reports which note the progression of Claimant’s condition. (CX 25-14 to CX 25-15 and CX 25-17 to CX 25-18.)

In a letter dated July 14, 1997, Dr. Partington noted that he had placed Claimant “in a course of physical therapy” in an effort to treat Claimant’s condition. (CX 25-5.)

Thereafter, it was determined that Claimant needed an anterior cervical discectomy with interbody fusion, which was performed by Dr. Partington on November 18, 1997. (CX 25-9 to CX 25-10.)

In a radiology report dated December 15, 1997, a Dr. George H. Christian, noted the following:

There are no old films available for comparison. Three views reveal evidence of a previous interbody fusion at the C4-C5 and C5-C6 levels. The alignment is good. There appears to be fusion apparently at the C5-C6 level and possibly inferiorly at the C4-C5 level. I see no malalignment. Slight reversal of the normal lordotic curvature is seen. The bony plugs are in good position.

(CX 25-11.)

In a letter, dated January 6, 1998, addressed to Claimant’s prior attorney, Stephen A. Strickler, Dr. Partington expressed, in relevant part, that based on an August 22, 1997 examination of Claimant, he opined that Claimant was totally disabled from working and that Claimant’s disability was related to the work injury which he suffered on May 9, 1997. (CX 25-12 to CX 25-13.)

On May 20, 2002, Claimant underwent a cervical myelogram. (CX 25-20.) In a post-myelogram report, a Dr. Cara Bonawitz expressed the following opinion:

1. No evidence for cervical spine stenosis. Neural foramina appear predominantly patent without focal herniation or gross nerve root impingement. Spinal fixation hardware with osseous fusion of C4 through C6.
2. Apparent defect in the posterior aspect of the bony canal for the left vertebral artery just distal to the left C6 transpedicular screw with some bony irregularity medial to this. This is of uncertain significance and the screw does not appear to extend directly into the canal for the vertebral artery itself. The distal aspect of the screws at the more superior levels appears to have a more lateral course within the facets.

(CX 25-21 to CX 25-22.)

In a letter dated June 7, 2002, addressed to a Dr. James Lockwood, Dr. Partington noted that Claimant continued to have neck and arm complaints of unclear etiology. (CX 25-25.) In his letter, Dr. Partington further expressed that he did not believe Claimant would benefit from more spinal surgery and that “[i]n an effort to be complete,” [he] [had] referred Claimant to Dr. Noel Parent for evaluation of possible thoracic outlet syndrome.”

In a letter dated October 11, 2002, addressed to Kelly Curran, who was the rehabilitation nurse handling Claimant’s claim, Dr. Partington, expressed that he agreed with the permanent physical restrictions that were outlined in Claimant’s functional capacity evaluation. (CX 25-23 to CX 25-24.) Dr. Partington further expressed that Claimant was capable of participating in vocational rehabilitation and that Claimant had reached maximum medical improvement.

Medical Records from Southeastern Neurology Group (CX 26)

Claimant’s Exhibit 26 is a record, dated August 4, 1999, of Claimant’s initial visit at the Southeastern Neurology Group. The record notes that Claimant’s main symptoms at that time were neck pain, a shaky arm, headache in the morning, and a heavy feeling in the right arm after working. The record also notes how Claimant was injured, Claimant’s medications, past medical history, past operations (bone graft at C4, C5, and C6 in November 1997 and titanium plate implanted at C4, C5, and C6 in November 1998), social history, family history, and a review of systems.

DISCUSSION

Causal relationship between injury and employment

In *Universal Maritime v. Moore*, the Fourth Circuit Court of Appeals set forth the respective burdens of proof for claimants and employers with regard to claims arising under the Act. *Universal Maritime v. Moore*, 126 F.3d 256, 262, 31 BRBS 119, 122-23 (CRT) (4th Cir. 1997). In that case, the Court noted that the Act provides a claimant with a presumption of coverage if that claimant “allege[s] (1) an injury or death (2) that arose out of and in the course of (3) his maritime employment.” *Id.* at 123. Thus, if the Claimant successfully establishes these elements of a *prima facie* claim, the burden of production shifts to employer. *Id.* Accordingly, if “employer does not offer substantial evidence to rebut the presumption, ... the

presumption provided by § 20 will entitle a claimant to compensation.”⁸ *Id.* (citing *Del Vecchio v. Bowers*, 296 U.S. 280, 284-85 (1935)). Conversely, if Employer “offer[s] evidence sufficient to justify denial of a claim, the statutory presumption ‘falls out of the case’ and does not remain as evidence that is weighed in finding facts.” *Id.* (citing *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935))

In this case, the Presiding Judge finds that Claimant has established a *prima facie* claim and therefore is entitled to invocation of the Section 20(a) presumption. As previously discussed, Claimant has alleged that he was injured on May 9, 1997, while working as a welder on Pier 20 of the Norfolk Naval Base, when a piece of airborne sheet metal struck him in the back of his head during an unexpected storm. Claimant has further asserted that he continues to this day to experience physical problems and pain as a result of that accident. In this case, Claimant’s allegations are supported by the uncontradicted testimony of Claimant (TR 54:22-60:25) and Mr. Hughes (TR 29:18-54:18; CX 1); the uncontradicted written statements of Claimant (CX 2 and 12), Mr. Hughes (CX 14), Mr. Fry (CX 11), and Mr. Ives (CX 13); and the uncontradicted opinions of Dr. Gershon (CX 20-1 to CX 20-3), Dr. Hansen (CX 21-24 to CX 21-25, CX 21-52 to CX 21-54, CX 21-121, CX 21-135 to CX 21-137), and Dr. Partington (CX 25-12 to CX 25-13), as well as the other medical evidence of record (e.g., CX 17). Accordingly, in this case, it is presumed that Claimant’s condition is causally related to his work-related activities on Pier 20. Moreover, in this case, the Presiding Judge notes that there is no evidence of record that rebuts the statutory presumption.⁹ Accordingly, the Presiding Judge finds that Claimant has established that his current head, neck, and right arm condition is causally related to his employment.

Nature and extent of disability

The Fourth Circuit Court of Appeals has stated that “[i]n order to make a finding of permanent disability, there must be substantial evidence that the condition alleged to be disabling has reached maximum medical improvement.” *Universal Maritime v. Moore*, 126 F.3d 256, 263, 31 BRBS 119, 124 (CRT)(4th Cir. 1997)(internal citations omitted). In this case, the Presiding Judge finds that Claimant reached maximum medical improvement on May 26, 2000, which is the earliest date on which a physician (Dr. Hansen) opined that Claimant’s problems were chronic and persistent and that Claimant had reached maximum medical improvement. (CX 21-111 to CX 21-114.) Moreover, the Presiding Judge finds that subsequent to May 26, 2000, the medical evidence of record, as summarized above, establishes that Claimant’s condition has not improved. Accordingly, in this case, the Presiding Judge finds that Claimant has established by a preponderance of the evidence that he became permanently disabled, as a result of his work-related injury, on May 26, 2000.

Having established the nature of Claimant’s disability, the Presiding Judge must now determine the extent of Claimant’s disability. In the Fourth Circuit, in order to determine the

⁸ The Court noted that “[w]hile substantial evidence requires ‘more than a mere scintilla,’ it is only ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Universal Maritime v. Moore*, 126 F.3d 256, 262, 31 BRBS 119, 123 (CRT)(4th Cir. 1997)(quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(quoting *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938)).

⁹ The Presiding Judge notes that included in the medical evidence in this case are references to other medical problems from which Claimant suffers that are not work-related. (CX 21-121.)

extent of Claimant's disability, the Presiding Judge must consider the evidence of record in light of a shifting proof scheme. *Moore*, 126 F.3d at 264, 16 BRBS at 124. Initially, Claimant must establish that he is incapable of returning to his prior employment. *Id.* Thereafter, "the burden shifts to the employer to prove that the claimant is not totally disabled by presenting evidence of other jobs that are available in the relevant geographic market for which the claimant is physically and educationally qualified." *Id.* (internal citation omitted). To satisfy this burden, the employer must demonstrate that a range of jobs exists that is reasonably available and can realistically be secured and performed by the disabled claimant. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). If the employer establishes that suitable alternate employment is available, the burden then shifts back to the claimant to show that he diligently tried and was unable to secure employment. *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201-02, 16 BRBS 74, 76 (CRT)(4th Cir. 1984).

After reviewing the evidence of record, the Presiding Judge finds that the uncontradicted evidence in this case, which includes Claimant's own testimony, several physicians' opinions, and the FCE, clearly establishes that Claimant has been and continues to be unable to perform his regular work as a welder. (TR 57:19-58:13; CX 20-1 to CX 20-3; CX 21-24 to CX 21-25; CX 21-111 to CX 21-114; CX 21-129 to CX 21-130; CX 24; CX 25-12 to CX 25-13; CX 25-23 to CX 25-25.) Therefore, the burden is on the employer(s) to establish that there is suitable alternate employment available to Claimant. In this case, there is no such evidence in the record. Accordingly, the Presiding Judge finds that Claimant, subsequent to his accident, has been and continues to be totally disabled as a result of his work-related injury.

Responsible employer

Section 4(a) of the Act sets forth who shall be liable for payment of a Claimant's compensation benefits under the Act:

Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9 [33 USC §§ 907, 908, 909]. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor. 33 U.S.C. 904(a)

Initially, the Presiding Judge notes that the uncontradicted evidence of record establishes that Atlantico is, at least technically, Claimant's employer. At the hearing, Mr. Hughes testified that Atlantico hired Claimant to weld fuel lines for the Pier 20 renovation project. (TR 49:9-50:21, 53:1-19.) Mr. Hughes further testified that he himself worked for Atlantico as a superintendent on the pier, and Claimant testified at the hearing that he received direction from Mr. Hughes. (TR 30:12-31:2; 60:15-18.) Moreover, on more than one occasion, Atlantico, who through November 2003 was paying Claimant benefits under the Act (CX 4), has acknowledged that Claimant was working for the company when he was injured on May 9, 1997. (CX 6, 7, 8, 9, 10.) Additionally, the Presiding Judge further notes that, in this case, neither Atlantico nor

any other party to this proceeding has challenged Atlantico's status as Claimant's actual, albeit perhaps nominal, employer.

Accordingly, in this case, the remaining issue to be decided is whether, notwithstanding the fact that Claimant was employed by Atlantico, at least in the technical sense, Magann can be held liable for the payment of Claimant's benefits under the Act as Claimant's statutory employer. In this case, the parties have proposed two different theories under which Magann may be found liable for the payment of Claimant's LHWCA benefits: the Director and Claimant argue that Magann is the statutory employer in this case because, at the time of Claimant's injury, either (1) Claimant was working as a borrowed employee for Magann or (2) Atlantico was working as a subcontractor for Magann.¹⁰

With regard to the first theory of liability that has been proposed in this case, the Presiding Judge notes that the Fourth Circuit Court of Appeals has recognized that the borrowed servant doctrine may be applied to LHWCA claims. *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 149 (4th Cir. 2000)(noting, in a case involving Section 5(a) of the Act, that "[w]hen the borrowing employer possesses ... authoritative direction and control over a particular act, it in effect becomes the employer" and that "[i]n that situation, the only remedy of the employee is through the LHWCA"). In *White v. Bethlehem Steel Corporation*, the Court stated that a "person can be in the general employ of one company while at the same time being in the particular employ of another 'with all the legal consequences of the new relation.'" *Id.* (internal citation omitted).

In *White*, the Court noted that in order to determine whether an individual is an employee of an alleged employer, the Supreme Court has stated that a court "'must inquire whose is the work being performed ... by ascertaining who has the power to control and direct the servants in the performance of their work.'" *Id.* (citing *Standard Oil Co. v. Anderson*, 212 U.S. 215, 221-22 (1909)(holding that where the general employer selected the plaintiff, paid his wages, and had the right to discharge him for incompetency, the plaintiff was not a borrowed employee of the stevedore, even though the plaintiff obeyed the signals of the stevedore's gangman, in timing the raising and lowering of cases of oil; the Supreme Court noted that "when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos" and that the "giving of the signals under

¹⁰ The Presiding Judge notes that Magann's counsel has asserted in its post-hearing reply brief that the court should not address Claimant's argument that he was a borrowed employee of Magann. (Magann Reply Br. 2.) Magann's counsel asserts that Claimant's counsel at the hearing stated that Claimant was not alleging that Magann was Claimant's actual employer and that Magann relied on this statement in presenting its case. (Magann Reply Br. 2.) Yet, after reviewing Claimant's counsel's statement, the Presiding Judge finds that he disagrees with Magann's counsel. (TR 22:15-23:22.) Overall, the Presiding Judge finds that, while there does appear to be some confusion between the parties regarding the use of the terms actual employer and statutory employer, the Presiding Judge finds that Claimant's counsel at the hearing was merely stating that Claimant was not alleging that Magann was Claimant's actual employer, in the technical sense as discussed *supra*. The Presiding Judge finds that Claimant's counsel was *not* stating that Magann might not be Claimant's primary employer under the borrowed servant doctrine at the time his injuries occurred. Moreover, the Presiding Judge finds that Magann's decision not to call a witness at the hearing was not motivated by its reliance on Claimant's counsel's statement at the hearing. Rather, the witness was not called at the hearing because, as Magann's counsel stated, the witness's "testimony would be cumulative to Mr. Hughes" and there was no need to call him. (TR 61:17-19.) Accordingly, the court will consider whether Magann is a borrowing employer and therefore liable for the payment of Claimant's benefits under the Act.

the circumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed co-operation rather than subordination, and is not enough to show that there has been a change of masters”))(specifically declining to adopt the Fifth Circuit’s nine-part inquiry because the “authoritative direction and control inquiry will more efficiently resolve a plaintiff’s borrowed servant status than a nine-factor balancing calculus”). The Court further noted that, with regard to this determination, the Supreme Court has emphasized “the importance of ‘distinguish[ing] between authoritative direction and control, and mere suggestion as to details or the necessary cooperation.’” *Id.* (citing *Standard Oil Co.*, 212 U.S. at 222). Moreover, the Court noted that the “authority of the borrowing employer does not have to extend to every incident of an employer-employee relationship; rather, it need only encompass the servant’s performance of the particular work in which he is engaged at the time of the accident. *Id.* (internal citations omitted).

In *White*, the plaintiff, worked for twenty-six years for C.J. Langenfelder & Son, Inc. (“Langenfelder”), which was in the business of renting construction equipment and the employees who operated that equipment to other companies, including the defendant Bethlehem Steel, Corporation (“Bethlehem”). *Id.* at 148. In this case, notwithstanding the fact that there was, at one time, a contract between Langenfelder and Bethlehem which stated “that Langenfelder would maintain ‘exclusive direction, supervision [and] control’ over its workers” which allegedly “continued to govern the parties’ relationship at the time of the incident in question[,]” the Court found that the plaintiff was a borrowed employee of Bethlehem. *Id.* The Court specifically noted that the contract did not change the true nature of the relationship between Bethlehem and the plaintiff, and that the “overwhelming weight of the undisputed evidence in this case” showed that Bethlehem “maintained authoritative direction and control” over the plaintiff, who in actual practice worked just as though he were a Bethlehem employee. *Id.* at 150. Specifically, the Court noted that the plaintiff was supervised by Bethlehem over a twenty-six year period; was assigned to the ships where he would work by Bethlehem; was paid his wages and insurance premiums by Bethlehem in pass-through form; and could effectively be fired by Bethlehem, who could exclude him from the job site. *Id.*

In this case, after reviewing the evidence of record, the Presiding Judge finds that Claimant was not under the authoritative direction and control of Magann when he was injured on May 9, 1997. Overall, the uncontradicted evidence in this case establishes that (1) Claimant was only supervised by and received directions from Atlantico’s superintendent Mr. Hughes (TR 60:15-18; CX 1-34); (2) the welding work being performed by Claimant pursuant to the contract between Atlantico and the Navy was solely the work of Atlantico (TR 31:3-7, 32:25-33:6, 49:9-50:21, 53:1-19; CX 1-34); (3) Pier 20 was owned by the Navy (CX 5-5); (3) Claimant was not paid by Magann, either directly or indirectly in pass-through form (39:11-41:24, 48:21-24); (4) Magann was not involved in Atlantico’s decision to hire Claimant (39:11-41:24, 48:21-24; CX 1-29 to CX 1-30); and (5) when problems arose on Pier 20 between Atlantico and Magann regarding storing materials or scheduling, they were resolved, albeit apparently in Magann’s favor, by navy representatives who had the authority to force Atlantico to comply with Magann’s requests (TR 34:2-6; CX 1-21, CX 1-42 to CX 1-43). Moreover, in this case there is no evidence that Magann could effectively fire Claimant by either forcing Atlantico to fire Claimant or by excluding Claimant from Pier 20.

Furthermore, while it is true that Mr. Hughes' has testified that, essentially, Magann was Atlantico's general contractor for the Pier 20 renovation, the Presiding Judge finds that the specific examples that Mr. Hughes provided at the hearing and at his deposition do not, in actuality, demonstrate that Magann and Atlantico were involved in a contractor (Magann)/subcontractor (Atlantico) relationship. In this case, the Presiding Judge notes that Mr. Hughes testified that Magann directed where materials would be stored on the pier, set the pace of the renovation, and "kind of" made sure that the renovation work, including work performed by Atlantico, complied with the government's specifications. (TR 33:9-34:2; CX 1-16, CX 1-19 to CX 1-20, CX 1-30 to CX 1-31, CX 1-42 to CX 1-43.) Yet, the Presiding Judge further notes that with regard to the fact that Magann apparently set the pace of the renovation, Mr. Hughes acknowledged that Atlantico had to comply with Magann's schedule in order to be able to perform its own work. (TR 41:25-43:13, CX 1-29.) Moreover, in this case, the fact that Magann had a say in where materials would be stored on the pier is logical in view of the fact that Magann was, as Mr. Hughes acknowledged, performing a major portion of the pier renovation (overall rehabilitation of the pier). (CX 1-29.) Additionally, the fact that Magann apparently reviewed Atlantico's work, at least to the extent that it impacted the integrity of the pier, to ensure that it complied with the government's specifications is also logical under the circumstances, since errors made by Atlantico could clearly directly impact Magann's own work on the pier. Indeed, under the circumstances of this case, where Atlantico's work could greatly impact and possibly impede or setback the work of Magann, the Presiding Judge finds that the interactions between Magann and Atlantico, as described by Mr. Hughes, reflect nothing more than the parties' practical need to coordinate various aspects of the pier renovation so that chaos would not ensue.

Overall, based on all of the foregoing findings, the Presiding Judge finds that Claimant was neither directly nor indirectly (through Atlantico) under the authoritative direction and control of Magann when he was injured. Indeed, in this case, the evidence of record reflects that, at least with respect to repairing the fuel lines pursuant to Atlantico's change order, Magann was actually serving as Atlantico's subcontractor. (TR 43:13-48:20; CX 5-5.) Accordingly, after considering all of the relevant evidence of record, the Presiding Judge finds that Magann was not a borrowing employer in this instance.

Finally, with regard to the second theory proposed by Claimant and the Director, the Presiding Judge notes that the rule for determining when a general employer will be held secondarily liable under Section 4(a) of the Act is set forth in the Benefits Review Board's ("Board") decision *Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005). In *Boyd*, which involves a claim falling within the jurisdiction of the Fourth Circuit, the Board stated:

A general employer will be held secondarily liable for workmen's compensation when the injured employee was engaged in work either that is a subcontracted fraction of a larger project or that is normally conducted by the general employer's own employees rather than by independent contractors.

Id. at 19 (citing *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 986, 11 BRBS 298, 316 (D.C. Cir. 1979), cert. denied, 448 U.S. 907 (1980)). The Board further stated that:

[S]ection 904(a) premises liability on a finding that the principal is subject to some contractual obligation, which it, in turn, passed in whole or in part to the subcontractor. *** The LHWCA distinguishes between employers who are owners and those who are general contractors working under contractual obligations to others.

Id. (citing *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 598-99, 33 BRBS 151, 152-54 (CRT) (5th Cir. 1999), cert. denied, 529 U.S. 1057 (2000)).

In *Boyd*, the claimant's husband worked for Hodges & Bryant ("H&B"), a plumbing, heating, and air condition company. *Id.* at 18. In this case, the claimant alleged that her husband was exposed to asbestos, which contributed to his death, while performing a job for H&B at a building being renovated by Newport News Shipbuilding ("NNS"), which was in the business of building and repairing ships. *Id.* "NNS was joined to the case as a potentially liable general contractor under Section 4(a) of the Act." *Id.* In affirming the administrative law judge's ("ALJ") determination that NNS was not a general contractor, the Board stated that the ALJ properly found that NNS was the owner of the building being renovated and was not under a contractual obligation to renovate the building. *Id.* at 19. The Board therefore noted that this was not a "two-contract situation" like in cases such as *National Van Lines*. *Id.* at 19-20 (internal citation omitted). The Board further noted that the ALJ "rationally found that there [was] no evidence that NNS [was] in the business of renovating buildings or that NNS's own employees usually perform[ed] this type of work." *Id.* at 20.

In this case, like in *Boyd*, there is no evidence that Magann had any contractual obligation to perform the fuel line repair work being completed by Atlantico on Pier 20, for which Claimant was specifically hired. Indeed, Mr. Hughes at the hearing and at his deposition testified that Atlantico had a separate contract with the Navy to perform the fuel line repairs on Pier 20. (TR 31:3-7, 32:25-33:6, CX 1-34.) Thus, Magann clearly was not obligated under a formal written contract to perform the fuel line repairs.

Moreover, in this case, the Presiding Judge finds that the evidence is insufficient to prove that Magann and Atlantico otherwise entered into a contractor (Magann)/subcontractor (Atlantico) relationship by either tacit or explicit unwritten agreement. Indeed, as just discussed, the Presiding Judge finds that Magann had no actual power to authoritatively direct and control Atlantico's work on Pier 20. Moreover, there is no evidence in this case that Magann had any involvement in the Navy's decision to award the fuel line repair work to Atlantico under the change order. Additionally, the Presiding Judge notes that, while the webpage from Magann's website states that "Magann Corporation entered into a partnering agreement [presumably with the Navy] to select a design team, work in coordination with Public Works, select subcontractors, and fast track the [Navy renovation] project from start to finish" and that as part of the renovation Magann demolished fuel lines and installed over 150,000 linear feet of various pipe, the webpage does not state either that Magann was the only general contractor working on the job or that Magann performed - or was otherwise taking credit for - repairing the fuel lines or any of the other work completed by Atlantico.¹¹ (CX 2-5.)

¹¹ The Presiding Judge notes that Magann's webpage also mentions that steam pipes, potable water lines, and the vault ventilation system were replaced. Accordingly, it cannot be presumed that the fuel lines replaced by Atlantico

Notably, both Atlantico and Magann had subcontractors working from them on this renovation. (TR 32:02-33:6.) Indeed, the evidence establishes that Atlantico actually subcontracted out a portion of its work under the fuel line replacement change order to Magann. (TR 43:13-48:20; CX 5-5.) Therefore, at least with respect to the work being performed under the change order, Magann was Atlantico's subcontractor. Accordingly, it cannot logically be said that the work being performed by Atlantico was a subcontracted portion of a contractual obligation owed by Magann to the Navy or that Atlantico's work on the pier constituted a contracted portion of Magann's regular business that was normally conducted by Magann's own employees. Thus, under the circumstances of this case, the Presiding Judge finds that Atlantico was not a subcontractor of Magann with respect to the fuel line repair work being performed by Claimant pursuant to the change order.

Accordingly, in this case, the Presiding Judge finds that Magann was not Claimant's statutory employer. Rather, as discussed in detail above, the evidence in this case establishes that Claimant, whose work-related activities were directed and controlled by Atlantico, was an employee of Atlantico at the time of his work-related accident.

ORDER

Therefore, for the reasons set forth in the foregoing discussion, it is ORDERED that Claimant's claim for compensation under the Act is hereby **GRANTED**.

It is FURTHER ORDERED that:

1. Employer Atlantico shall pay Claimant disability benefits at a rate of \$669.80 per week for temporary total disability from May 10, 1997 to May 22, 1997 and August 22, 1997 through May 25, 2000 and permanent total disability from May 26, 2000 to the present and continuing.
2. Employer Atlantico is entitled to a credit for any and all compensation already paid.
3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).
4. Employer Atlantico shall furnish medical care to Claimant pursuant to Section 7 of the Act.

are included in the 150,000 linear feet of various pipe that Magann states that it installed. Moreover, the Presiding Judge further notes that Magann's website provides little evidence of the true nature of the relationship between Magann and Atlantico in light of other highly probative evidence that has been presented in this case. *See White v. Bethlehem Steel Corp.*, 222 F.3d 146, 150 (4th Cir. 2000)(finding that an expired contract stating that the actual employer retained control of the plaintiff, who the actual employer provided to the defendant employer to operate construction equipment, did not change the true nature of the plaintiff's relationship with the defendant employer, in light of overwhelming evidence in that case that the plaintiff was actually a borrowed employee).

5. All computations are subject to verification by the District Director.
6. Claimant's attorney shall have 30 days to file his attorney fee petition and Employer's counsel shall have 20 days, after receipt of that petition, to file objections thereto.

SO ORDERED.

A
Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/mam